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No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1930

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

ERIE COAL & COKE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM IN BEHALF OF PETITIONER

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D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-third District of Pennsylvania, petitioner

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Petitioner neglected to mention, either in the petition or in the supporting brief, the case of *Roberts Sash & Door Company* v. *United States,* 38 F. (2d) 716, No. 97, in this Court, present term (certiorari denied October 13, 1930). In that case, as in the instant case, the taxpayer filed a claim in abatement, accompanied by a surety bond conditioned upon the payment of any additional tax found to be due. After the statutory period for the collection of the tax had expired the Collector demanded payment of an additional assessment. The taxpayer paid this under protest, and the surety bond was released. The Court of Claims held that the taxpayer could not recover the amount paid. The case is, consequently, squarely in conflict with

the decision of the Circuit Court of Appeals in the instant case.

The United States opposed the petition of Roberts Sash & Door Company, and our brief (filed on July 19, 1930) stated that there was no conflict of decisions. We did not realize that the decision of the Circuit Court of Appeals in *Heiner* v. *Erie Coal & Coke Company* involved the point in question. The opinion in that case was handed down on July 9, 1930, after the preparation of the first draft of our brief in the *Roberts case*. The opinion in the *Heiner case* does not mention the point, but it does necessarily decide it, as it is in the case and was argued to the court.

We are sending to counsel for the Roberts Sash & Door Company a copy of this memorandum, with a statement that we will not oppose a motion for reconsideration of his petition for certiorari if he sees fit to file such a motion.

Respectfully submitted.

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Solicitor General.

CHARLES B. RUGG,
Assistant Attorney General.

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OCTOBER, 1930.

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